Petitioner appealed to the Court of Appeals from the judgment of conviction (D197a). The judgment of the Court of Appeals here sought to be reviewed affirmed the conviction (Appendix, *infra*, p. 15a). Petitioner is free on bail pending the instant proceedings in this Court.

The allegedly perjured testimony was given in May and June, 1956, before a Federal grand jury investigating possible violations of the laws relating to racketeering, 18 U.S.C. §§1951 and 371 (D7a-13a).[2] The investigation was particularly concerned with alleged garment-district truck racketeering activities of one Abe Chait (*ibid;* D126a-127a, D188a-189a, D192a).

In August, 1945, petitioner and one Joseph Stern had formed a partnership to engage in a trucking business, known as Stern's Express Co. (D7a, D31a). The Government was apparently endeavoring to find out from petitioner whether Chait was responsible for petitioner's entering into the partnership and whether Chait received any money from it. (D7a-13a). Counts I and IV of the subsequent perjury indictment related to petitioner's denials before the grand jury that he knew Chait before forming the partnership; Count IV included an averment that petitioner said he had first met Chait after formation of the partnership, when he would see Chait "walking through the street," Chait's own business having been "across the street:" Count IV also included a denial by petitioner that Chait had anything to do with petitioner's going into Stern's Express, but the indictment did not charge that this last was false (D7a, D11a, D13a). Count II related to petitioner's denial to the grand jury that Chait ever received any money from Stern's Express (D8a-9a). Count

[2] Petitioner had and has no prior criminal record (D185a, 191a).

III, relating to petitioner's denial that Chait was a partner in Stern's Express (D10a-11a), was dismissed by the District Court for failure of proof (D133a-134a).

The materiality of the grand jury testimony was stipulated (D15a).

The Government's witnesses to support Counts I and IV (as to when petitioner met Chait) were petitioner's partner Stern, and one Irving Mishel. Only Stern was offered for "direct" evidence; Mishel "corroborated" Stern *per* "admissions" of the petitioner.

The opinion of the court below presented the following as Stern's testimony on Counts I and IV (Appendix, *infra*, p. 3a):

> "* * * that Stern had seen Goldberg and Chait together once or twice, 'talking nice,' before August 1945 when Stern's Express started, and that the partnership was arranged at a meeting between Stern and Goldberg which Chait attended."

However, Stern's own words do not positively say, anywhere in his testimony, that the time of his having seen petitioner and Chait "together" or "talking" was before August 1945 (D32a, D51a-54a, D62a-63a);[3] his words concerning the partnership meeting are immediately followed by reiterative failures of recollection about that meeting and a description susceptible of meaning that only Stern and petitioner were present (e.g., D32a-39a); and Stern's testimony as a whole (on all of the counts) was so uncertain, inconsistent and confused as to cause both the Gov-

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[3] These pages of the printed Appendix contain Stern's entire testimony relating expressly to the subject matter of Counts I and IV.

ernment and the District Court to speak disparagingly of it (D127a, D152a, D169a, D185a, D186a-187a).

We next note how the above "direct evidence" of Stern as to Counts I and IV was "corroborated" by Mishel, a witness of the lowest order of credibility,[4] who happened to have resided some years before in the same apartment house as petitioner (D80a). The opinion of the court below presented the following as the "corroboration" given by Mishel (Appendix, *infra*, p. 3a, 4a; see D105a):

> "[Petitioner had told Mishel] that when he come out of the service he figured he was going to go back in the shylocking business but instead he met Big Dick who was connected with the Chaits * * * And Chait said 'Listen, I got a trucking business. I will put you in. We will work out a proposition.' So he went in to Stern's Express."

It will be noted that this alleged "admission" is irresolvably ambiguous as to whether Chait himself rather than "Big Dick" or some other intermediary actually did the alleged speaking to petitioner about going into Stern's Express. Moreover, the said alleged "admission" of the petitioner was brought in at the trial through the medium of being read by Mishel from his grand jury testimony D(104a-105a).[5] The court below seems to have acknowl-

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[4] See D77a-79a, D81a-84a, D114a-117a, D119a, for Mishel's long criminal record, his fencing with the District Court as to "self-incrimination", and the posture of his hopes for parole from his then incarceration.

[5] The ambiguity just noted, of which the Government was of course well aware from the time of Mishel's grand jury testimony, doubtless explains why, as above mentioned (p. 4, *supra*), the indictment pointedly refrained from charging falsity to the petitioner on this phase of his own grand jury testimony, i.e., on his denial that Chait put him into Stern's Express (D13a). Nevertheless testimony on this subject was freely admitted over defense objection (e.g., D104a-105a).

edged that a serious issue was presented as to whether Mishel had no present recollection but merely avowed having given the testimony before the grand jury (Appendix, *infra*, p. 6a). This issue infused Mishel's indispensable "corroborative" testimony in literally every line and word thereof where material controverted points were presented under all counts of the indictment (D94a-109a, D110a, D117a-119a), as, time after time, he asserted failure of present recollection as to substantive facts (e.g., D95a-100a, D102a, D103a, D105a); claimed that he recalled making statements to the grand jury (e.g., D101a, D102a), that if he said something to the grand jury it was then the truth (e.g. D97a 98a, D101a, D102a), and evasively responded, when asked if specific grand jury testimony was true, with such expressions as "if you let me see my statements I will be glad to read into the record whatever I did say" (D101a), "the statement is the same as I made then" (D102a), "my answer is the same today" (D102a), "that was my answer then; it is my answer now" (D104a), "I was asked this in front of the grand jury and I answered it to the grand jury" (D104a), "all I recall is making the statement and I know it was true then and I believe if this is a certified statement it is true now" (D105a),[6] "did I make a statement about that in there? If I made the statement, whatever I made were the facts * * * That is the answer I gave" (D106a), "the best of my recollection now is that anything I said then was the truth" (D107a). (The foregoing was in Mishel's direct examination by the Government.)

During cross-examination, Mishel, umbraged at defense emphasis upon his notable criminal record (D113a-116a),

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[6] The answer last quoted referred to the sole "corroborative" item for Counts I and IV adduced in the opinion of the Court as quoted below at p. 3a, *infra* (see D105a).

spoke words (D117a) which the court below deemed a sufficient declaration by Mishel of present recollection-refreshed, notwithstanding the "hostility" motivation which, the Court also said, could be attributed to Mishel's sudden access of refreshment (Appendix, *infra*, p. 6a).

The record discloses that the quality of the Government's proofs on Counts I and IV caused difficulty in the jury room, as the jurors twice had to request the Court for a rereading of the testimony showing "whether there were definite statements" by Stern and Mishel that petitioner knew Chait before the trucking partnership was formed (D178a-179a).

On Count II, relating to Chait's alleged receipt of money from Stern's Express, the only direct evidence was, again, by Stern (D32a-46a, D47a-51a, D54a-62a, D63a-75a). But it was undisputed that his testimony was not "positive". The Court below pointed out, after delineating some of Stern's testimonial gyrations, that he "ended up by saying, in answer to an endeavor by the Court to reconcile his testimony on direct and on cross-examination, "I don't know whether he [Chait] got any money exactly" (Appendix, *infra*, pp. 4a, 5a). The District Court, as seen, had disparaged Stern's testimony as a whole (p. 6, *supra*). The prosecutor, writing off Stern as an effective witness under Count II, stated "frankly" that the Government's proofs regarding the payments to Chait "come from the admissions of the defendant [*per* Mishel again—see below] * * * corroborated by the documentary evidence [*per* witness Hassell—see below] * * * " (D127a).

This left, under Count II, solely testimony by Mishel of alleged conversational admissions by the defendant, and

"corroborative" testimony of an F.B.I. accountant (Hassell) analyzing the trucking concern's books and records. Mishel's Count II testimony adduced by the Court below was that petitioner "had told him Chait was getting money from Stern's Express—'something like' $200 a week, although 'It could have been $150; it could have been $250' " (Appendix, *infra*, p. 4a; see D102a).[7] This item was, again, one that was read by Mishel from his grand jury testimony (D103a-104a). In his direct testimony at the trial he never once accepted responsibility for "present recollection" of that grand jury testimony (D100a-104a), and in fact he expressly cast doubt on its accuracy, indicating that the subject matter of his alleged conversations with petitioner about the trucking firm's expenditures could have related not to money for Chait but to legitimate expenses of the trucking business (D100a). Mishel's belated access of present recollection, when he took offense at the cross-examination (p. 8, *supra*) was in blanket terms, not specifically addressed to his testimony on Counts I and IV on one hand, or that on Count II on the other (D117a).

The F.B.I. accountant, Hassell, "corroborating" Mishel's testimony of petitioner's "admissions", presented a 15-sheet analysis or chart of the trucking concern's books and records for 1945 to 1953 purporting to show that a weekly item for unidentified "expenses" was more or less consistently in an amount that *could* indicate money being drawn out by or for *someone* on a basis more or less equal to the weekly drawings of Stern and the petitioner (Exh. 23[8], in Ev. D87a; see D84a-90a). The court below described

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[7] Mishel's entire testimony relating specifically to Count II appears at D100a-104a.

[8] Nine copies of this exhibit are filed herewith.

Hassell's chart (Appendix, *infra*, p. 5a) and termed it "compelling" (*id.*, p. 11a).[9] Actually, neither the chart nor the company books from which Hassell derived it, showed any payments to or for Chait. It was not only pure speculation that the trucking firm's weekly "expenses" were paid virtually *in toto* for eight years to an Abe Chait or to any other secret "partner"; the Government's proofs left it wholly to speculation as to *any* purpose for which those amounts were spent if they were not legitimate business expenses. The amounts involved, averaging considerably less than ten per cent of the gross cash disbursements, were not on their face inconsistent with a legitimate "expenses" budget for a company maintaining a fleet of busy trucks. The court below referred to "synchronization of the jumps in unidentified 'expenses' with increases in the partners' drawings" and said this could not be accounted for solely by the fact that the total expenses of the business were increasing as shown on Exh. 23 (Appendix, *infra*, p. 11a). But the Government advanced neither proof nor theory to negate the quite conventional possibility that the "synchronization" meant the partnership was able to afford larger "expense accounts" for its principals "synchronizedly" with its ability to afford each increase in their "drawings"; or, as suggested by defense counsel at the trial (D125a-126a), that for all that appeared the petitioner and Stern or either of them were simply drawing out extra money for themselves.

The defense duly reserved, by various motions, objections, exceptions and requests, all of which were denied, its

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[9] The trial judge, however, said "I don't think this analysis is very strong in proof that the money went to Chait, which is really the issue in the case" (D132a).

positions that the above proofs were inadmissible, and inadequate for submission to a jury in a federal perjury prosecution, not submitted to the jury under proper instructions, and inadequate to sustain the verdict of conviction (D 24a, D47a-48a, D101a, D104a, D106a, D120a-132a, D133a, D176a, D184a-185a).

The District Court submitted the case to the jury under a charge on the "two-witness rule" and on the general rule of proof in perjury which omitted all reference to the standards that the direct evidence in such proof must be "positive", that the corroborative evidence of such proof must be "strong" and "inconsistent with innocence", and that such proof as a whole must be "clear and convincing" (D170a-172a). The charge also omitted any instruction on the probative adequacy of "admission" testimony consisting of alleged oral unsworn statements of the accused, on the relationship of such "admission" testimony to the presence or absence of sufficient *prima facie* "direct" evidence in this trial record, or on any phase of the law relating to such "admission" testimony in federal perjury cases (*ibid.*).

The District Court declined defense requests to charge the jury that there was no direct evidence in the case, that unless the jury believed Mishel they must acquit, and that Exhibit 23 (Hassell's chart) was not sufficient as a matter of law to constitute corroboration of one direct witness (D176a).

The court below, in entertaining all of the contentions advanced in petitioner's appeal (Defendant-Appellant's Br., pp. 1-9, 12-26) addressed to the adequacy of the proofs and the jury instructions thereon, considered and rejected

all of the points embraced in our preceding last three paragraphs herein (Appendix, *infra*, pp. 9a, 11a, 12a). Specifically, the court below held that, on Counts I and IV, there was "direct evidence" by Stern that petitioner knew Chait before August 1945, "adequately corroborated by Mishel's testimony that [petitioner] had admitted as much," citing the *Vetterli* case (cited and discussed pp. 17, 18, *infra*) (Appendix, *infra*, p. 10a); and that, on Count II, the Government's case would stand sufficiently proven by Mishel's "admission" testimony "corroborated" by "records" (Hassel's chart and the firm's books) within the meaning of *United States* v. *Wood*, 14 Pet. 430, and that in any event Stern's "halting and • • • weakened" testimony that payments were made to Chait "provided the tesimony of one witness • • • and the books would have been sufficient corroboration alone, *a fortiori* when coupled with defendant's admission to Mishel", relying on the *Arena* case (cited and discussed at pp. 13, 16, *infra*) (Appendix, *infra*, pp. 11a, 12a).

The court below also found unmeritorious petitioner's contentions of prejudice resulting from Mishel's adopted grand jury testimony (*id.*, p. 6a), and the imputation to petitioner of the prior unrelated crime of usury by the Government's elicitation of Mishel's grand jury remark that petitioner admitted "shylocking" (*id.*, p. 12a).

Reasons for Granting the Writ

1. The Government's invitation to this Court [10] in *Weiler* v. *United States*, 323 U. S. 606, to reject the "two-witness rule" (or the rule of one witness plus corroboration) in perjury cases was declined. The invitation denoted the high-water mark of Dean Wigmore's virtually single-

[10] See 89 L. Ed. 496.

handed[11] opposition to the "two-witness" rule. Interestingly, it is the literal "*two*-witness" rule which Wigmore disfavors (§2042); he does not attack the modern form of the rule (one witness plus corroboration) (§2043), although his followers lose sight of Wigmore's discrimination in this respect (see preceding footnote). Since *Weiler* was decided in 1945, this Court has rested content with the status of the rule (the Court's last expression on the question was its approving reference to *Weiler* in the following year (1946), in *Fisher* v. *United States*, 328 U. S. 463, 476). However, the prestigious Wigmorean disfavor (or supposed disfavor) has continued to operate non-discriminatingly in various attritive ways against the rule—chiefly, and most distinctively, in cases that have fostered a drastically increased probativeness for defendants' unsworn oral admissions and a drastically reduced force for the traditional canons of "strong" proof (and especially of "strong" *corroboration*) in perjury cases (see below). These attritions, unless this Court takes a hand in the matter, cannot but end with an effective abrogation of the rule of one-witness-plus corroboration in federal perjury prosecutions. The decision here sought to be reviewed imports, we think it may safely be said, the most serious undermining of the rule that has occurred in the federal courts in the post-Weiler era; and it does so in both of the prime sensitive

[11] With the possible exception of *State* v. *Storey*, 148 Minn. 3908, 182 N.W. 613 (1921), every judicial or scholarly authority we have seen in which the above rule is disparaged, including the opinion below (Appendix, *infra*, p. 7a), rests upon Dean Wigmore's name or upon his arguments. Wigmore, On Evidence (3rd Ed.) Vol. 7, pp. 273-277. E.g., *Arena* v. *United States*, 226 F. S. 227 (C.A. 9, 1955), cert den. 350 U. S. 954. *United States* v. *Marachowsky*, 201 F. 2d 5, 11 (C.A. 7, 1953), cert den. 345 U. S. 965; *Cohen* v. *United States*, 27 F. 2d 713 (C.C.A. 2, 1928); 28 George Washington Univ. L. Rev. 786, 789-790; 23 Tex. L. Rev. 406; 51 Colum. L. Rev. 1056; 10 Univ. Fla. L. Rev. 77; 44 Mich. L. Rev. 483.

areas above mentioned—the effect of defendants' admissions, and the strength of required proof.

For (passing for the moment the "admissions" question), conspicuous in this case by their absence and lacking any remotest recognition by either of the courts below, are the (one had thought) established canons of perjury proof that "direct" evidence must be "positive"[12]—which was surely not true of the only purportedly "direct" evidence herein, that of Stern; that perjury proofs as a whole must be "strong", "clear", "convincing"[13]—descriptions which (and see the last footnote herewith) surely do not apply to Stern's equivocations, Mishel's credibility-shaken "adoption" of his grand jury testimony, or Hassell's speculative Exh. 23; that corroboration must be "strong", "convincing", or in some other measure possessing a significant degree of *strength*[14]—qualities one would scarcely attribute

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[12] E.g. *Hart* v. *United States*, 131 F. 2d 59, 61 (C.C.A. 9, 1942); *United States* v. *Otto*, 54 F. 2d 277, 279 (C.C.A. 2, 1931); *Allen* v. *United States*, 194 Fed. 664 (C.C.A. 4, 1912). See 15 A.L.R. 634; 27 A.L.R. 857; 42 A.L.R. 1063.

[13] E.g. *Beckanstin* v. *United States*, 232 F. 2d 1, 4 (C.A. 5, 1956); *Spaeth* v. *United States*, 218 F. 2d 361 (C.A. 6, 1955), opinion by Stewart, J. (referring to the burden of proof in perjury as "stringent", "unique", "extraordinary", "higher"); *United States* v. *Rose*, 215 F. 2d 617, 623 (C.A. 3, 1954) ("clear and convincing * * * to a moral certainty"). *Smith* v. *United States*, 169 F. 2d 118, 121 (C.A. 6, 1948) (same); *Fotie* v. *United States*, 137 F. 2d 831, 840 (C.C.A. 8, 1943) ("excluding every other hypothesis than that of guilt"). Cf. *United States* v. *Wood*, 14 Pet 430, 440 ("unequivocal").

[14] E.g. *Weinheimer* v. *United States*, 283 F. 2d 510, 512, (C.A.D.C. 1960), cert. den. 364 U. S. 932 ("support the witness directly and in important respects"); *Boehm* v. *United States*, 123 F. 2d 791, 809, 810 (C.C.A. 8, 1941), cert. den. 315 U. S. 800 ("satisfactory corroboration"); *Phair* v. *United States*, 60 F. 2d 953, 954 (C.C.A. 3, 1932) ("strong"); *Hashagen* v. *United States*, 169 Fed. 396, 399 (C.C.A. 8, 1909) ("more than sufficient to overbalance" defendant's oath); *Cook* v. *United States*, 26 App. D.C. 427, 430 ("of a strong character, and not merely corroboration in slight particulars"). See also 25 A.L.R. 416, 418; 111 A.L.R. 825, 827, 828, 829, 830-831; Wigmore, On Evidence (3rd Ed.), Vol. 7, p. 278, N.5.

to the Mishel and Hassell proofs of "corroboration" herein; and, above all, *that corroboration as such must be "inconsistent with innocence"* [15]—which would be an egregiously optimistic way to characterize Hassell's "corroborative" Exh. 23, or Mishel's "corroborative" testimony of alleged "admissions" by petitioner. The court below, in abandoning (such was the effect) each of the foregoing canons, put itself in conflict with every other decided case on the subject in every other federal Circuit that has spoken thereon (see preceding footnotes)[16] except for the remarkable decision

[15] E.g. *Doty* v. *United States*, 261 F. 2d 10, 12 (C.A. 10, 1958); *Cuesta* v. *United States*, 230 F. 2d 704, 707 (C.A. 5, 1956); *United States* v. *Neff*, 212 F. 2d 297, 307, 308 (C.A. 3, 1955); *Miranda* v. *United States*, 196 F. 2d 408, 411 (C.A. 9, 1952), cert. den. 344 U. S. 842; *United States* v. *Hiss*, 185 F. 2d 822, 824 (C.A. 2, 1950), cert. den. 340 U. S. 948; *Hart* v. *United States*, 131 F. 2d 59, 60, 61 (C.C.A. 9, 1942); *United States* v. *Isaacson*, 59 F. 2d 966, 968 (C.C.A. 2, 1932); *Gordon* v. *United States*, 5 F. 2d 943, 945 (C.C.A. 8, 1925). And see 42 A.L.R. 1063, 1064; 111 A.L.R. 825, 828, 830; 28 Geo. Wash. U. L. Rev., 786, 787 (Fn. 12), 789; 38 Va. L. Rev. 104, 105.

[16] This, notwithstanding that two of the most frequently cited cases for the rule that corroboration must be inconsistent with innocence are from the Second Circuit (the *Hiss* and *Isaacson* cases, cited in the preceding footnote). The opposite trend in that Circuit, instanced so drastically in the case at bar, seems to have begun in *United States* v. *Lester*, 248 F. 2d 329, 330 (C.A. 2, 1957), where rejection of the traditional canons of strong corroboration was justified by patently erroneous use of a quotation from Wigmore ("It is now everywhere conceded in the United States that a single witness, somehow corroborated, suffices"—§2042). Wigmore was not saying that it was sufficient if corroboration be effected "somehow"; he was merely describing the supplanting of the two-witness rule by the rule of one-witness-plus corroboration, and, after noting the differing standards of corroboration in various jurisdictions, he made the above quoted remark. Far from declaring that *any* corroboration at all ("somehow") suffices, Wigmore was *refraining* from choosing among the diverse rules as to quanta of such proof in perjury. The *Lester* Court's seizure upon and misapplication of this phrase of Wigmore's bespeaks the force of the recurrent judicial impulse to make perjury convictions "easier". See the similar defects of scholarship in this area discussed in the text following this footnote, relating to recent judicial misreadings of *Hammer* v. *United States*, 271 U. S. 620, 627.

in *Arena* v. *United States*, 226 F. 2d 227, 232-234,, 236-237 (C.A. 9, 1955), cert den. 350 U. S. 954,[17] where it is laid down that the only canon for measuring the quantum or strength of corroboration proofs in perjury is that the evidence need only "tend" to show guilt. The Court below seems to have expressly aligned itself with the unique *Arena* decision on this point, for it cited that case at a place in its opinion dealing with the sufficiency of the "corroboration" in our case (Appendix, *infra*, p. 12a). The *Arena* decision is not only solitary outside of the Second Circuit, it is demonstrably the product of erroneous scholarship, for it rests dispositively (226 F. 2d at 232) on an outright misreading of *Hammer* v. *United States*, 271 U. S. 620, 627.

The Court in *Hammer* was not (and scarcely could have been) speaking of any canon relating to corroboration in perjury, for (1) the case involved only a single, *wholly uncorroborated* witness and hence could present no issue of quantum of corroboration; and (2) the Court's words which were deemed operative in *Arena* ("the kind or amount of *other* evidence") unmistakably referred to documentary evidence *in lieu* of testimony by a living witness (within the meaning of *United States* v. *Wood*, 14 Pet. 430, of which the Court was there speaking in *Hammer*), not to *corroboration* of primary or direct evidence. Yet this same misreading of the *Hammer* case has found its way else-

[17] We realize that the denial of certiorari in *Arena* does not call upon us to justify our prayer in the instant Petition (Stern and Gressman, Supreme Court Practice [2nd Ed.], p. 149). However, we note that on its facts *Arena's* suitability for certiorari was virtually *nil*, for not only was the corroborative proof there of very impressive strength; the unsuccessful assertions made against it did not even go to its *quantum* or *strength* to prove the *corpus delicti* but were addressed to its *relevance* to the corpus delicti, a quite distinct problem needless to say, and one which in the *Arena* case was properly found to present no real difficulty.

where too into expressions by federal courts, where it has worked attrition on the "two-witness" rule in other serious ways (see below). E.g. *United States* v. *Marachowsky*, 201 F. 2d 5, 10 (C.A. 7, 1953), cert. den. 345 U. S. 965; *Vetterli* v. *United States*, 198 F. 2d 291, 293 N. (C.A. 9, 1952), vacated and remanded on other grounds, 344 U. S. 872.

The decision here sought to be reviewed carries to a new climax another of the current attritive trends in federal perjury proof:— (1) the court below held that alleged "admissions" of the petitioner, made orally in ordinary conversations preceding the allegedly perjurious statements, were probative as "corroboration" for Stern's "direct" evidence under all three Counts. (2) The Court below alternatively deemed that, as to Count II (re payments to Chait), if Stern's admittedly unsatisfactory "direct" evidence were left out, those "admissions" of the petitioner could serve as the *primary* proof of guilt, "corroborated" by Hassel's Exh. 23. Only one other Circuit has *held* that a defendant's oral unsworn admissions may serve as "corroboration" in a perjury prosecution, *Vetterli* v. *United States*, 198 F. 2d 291, 293 (C.A. 9, 1952), vacated and remanded on other grounds, 344 U. S. 872. But in *Vetterli* (1) the "admissions" were by no means the sole "corroboration" as they are in our case under Counts I and IV; and (2) the "admissions" were made in such circumstances of solemnity as to endow them virtually with the quality of sworn admissions and negate for all practical purposes any chance of non-authenticity, *i.e.*, they were made *in the presence of the defendant's attorney and to an F.B.I. agent.* The *Vetterli* "rule" has been favorably noted in only one other Circuit,[18] and there only by way of *dictum.*

[18] We have found only one other such favorable reference, in a dictum in another Ninth Circuit case. *Umbriaco* v. *United States*, 258 F. 2d 625, 629 N. 6 (C.A. 9, 1958).

(and in connection with written "admissions" given by a husband and wife jointly to government agents, the case involving also substantial additional "corroboration", all of which, however, failed to save the judgment of conviction because of the absence of any "direct" evidence). *Nessanbaum* v. *United States*, 205 F. 2d 93, 98 (C.A. 3, 1953). *Vetterli*, notwithstanding its numerous features distinguishing it from our case and the feebleness of its authority as a "precedent", was the sole precedent cited by the Court below for its holding that Mishel's testimony of petitioner's alleged "admissions" was "corroborative" of Stern under all counts.[19]

In arriving at this conclusion the Court below disparaged even the axiomatic rule that a defendant may not be convicted of perjury on oral admissions alone (Appendix, *infra*, p. 8a, fn. 1); from this it is not difficult to discern the ultimate direction of the thrust of decisions like *Vetterli* and that here sought to be reviewed.

Indeed, that thrust did, in this case, reach significantly still closer to the innermost battlements of the one-witness-plus-corroboration rule, when the Court below made its alternative holding, with respect to Count II, that the alleged admissions could serve as the primary proof of guilt ("corroborated" solely by Hassell's Exh. 23) (Appendix, *infra*, p. 11a). For this *avant-garde* holding the Court below cited no square authority; instead it *extended* the "document" rule of *United States* v. *Wood*, 14 Peters 430, which allows documents of strong authenticity to sub-

[19] It is true that under Count II Stern was also held "corroborated" by Hassell's Exh. 23, but we claim this document would have been barred by the tests of "strong" corroboration "inconsistent wit[illegible]nocence".

stitute as "direct evidence" for one living witness; but this extension of the *Wood* case as here proposed must, again, put the cart before the horse by treating the non-documentary "admissions" as the primary proof of guilt, "corroborated" by the speculative documentary Exh. 23 as the *strong* circumstantial evidence envisaged by *Wood*. Should such become the rule in federal perjury trials it would at long last be impossible for a court to state, as was done in *Umbriaco* v. *United States*, 258 F. 2d 625, 628-629 (C.A. 9, 1958), "We have found no case of perjury in the Federal Courts in which there was present a corroborated, oral, unsworn admission of falsity, and there was no other direct evidence in the case." [20]

Should the decision below go unreviewed and unreversed it cannot but strike a quite-possibly fatal blow to the perjury rule of one-witness-plus-corroboration, for it obliterates the "quantum" canons which are indispensable for the viability of that rule, and it thins to the point of breakthrough the "admission"-proof restrictions which are integral with that rule. The protections of that rule which have made possible the just and wisely-moderated results reached in perjury cases like those cited in the accompanying footnote[21] would lose much of their effectiveness, and the administration of federal criminal justice in perjury prosecutions would lose much of its admirable quality of

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[20] A conviction obtained in just that manner was reversed in *United States* v. *Alu*, 236 F. 2d 179 (C.A. 3, 1956).

[21] *Umbriaco* v. *United States*, 258 F. 2d 625 (C.A. 9, 1958); *United States* v. *Neff*, 212 F. 2d 297 (C.A. 3, 1954); *Fraser* v. *United States*, 145 F. 2d 145 (C.A. 6, 1944), cert. den. 324 U. S. 842; *United States* v. *Otto*, 54 F. 2d 277 (C.A. 2, 1931); *Clayton* v. *United States*, 284 Fed. 537 (C.A. 4, 1922).

civilized temperateness,[22] if the authority of the decision sought to be reviewed should attain finality. It is usually said that ancient purposes of the rule no longer apply and that the only authentic modern reason of policy for its preservation is the protection of witnesses against ill-motivated charges of perjury. Wigmore, On Evidence (3rd Ed.), Vol. 7, pp. 275 *et seq.* Our research discloses, however, that a deeper policy interest, an interest of incomparably more far-reaching social value, is bound up in the rule. We refer to the interest in the *presumption of innocence,* whose preservation has been recognized, from the earliest times, as presenting difficulties of peculiar acuteness in perjury prosecutions and as calling therefore for peculiar exertions to ensure its accomplishment. This policy-purpose behind the rule has not been articulated in the writings of the dominant Wigmorean scholarship. But its existence has been noted many times in the cases, e.g., *R.* v. *Muscot,* 10 Mod. 192 (1714); *United States* v. *Wood,* 14 Pet. 430, 437-439 (exhaustively reciting the text-writers); *Hashagen* v. *United States,* 169 Fed. 346, 399 (C.C.A. 8, 1909); *Clayton* v. *United States,* 284 Fed. 537, 540 (C.A.A. 4, 1922); *Hart* v. *United States,* 131 F. 2d 59, 61 (C.C.A. 9, 1942). Cf. *United States* v. *Isaacson,* 59 F. 2d 966, 968 (C.C.A. 2; 1938). And see 15 A.L.R. 634, 636; 111 A.L.R. 825, 826, 827, 830.

The reasons above advanced for the granting of the writ are believed to satisfy Rule 19(1)(b): (1) The decision below is in conflict with the decisions of the Circuits enumerated

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[22] " * * * No real help is obtained by the use of noble platitudes to the effect that the crime of perjury pollutes the stream of justice at its source with the implied conclusion that it must be stamped out at all costs * * *." *United States* v. *Otto,* 54 F. 2d 277, 279 (C.C.A. 2, 1931).

in footnotes 13, 14, 15, pp. 14, 15, *supra*, as respects the canons or standards governing the quantum of proof for proof of perjury, and, more particularly, the strength of corroboration required. (2) The court below, in its treatment of said question concerning proof in perjury cases, and more particularly in its rulings and holdings on the effect of the testimony of the alleged "admissions" herein, has decided important questions of federal law which have not been, but should be, settled by the Court. Additionally, review should be granted because the important questions presented concerning the rule of one-witness-plus-corroboration in perjury cases, and the injustice of the petitioner's conviction, call for an exercise of this Court's function of determining proper standards for the enforcement of the federal criminal law in the federal courts.

2. The facts noted at pp. 6-8, *supra*, concerning the witness Mishel's adoption of his grand jury testimony at the trial, the prejudice thereby caused to petitioner, and the rejection of petitioner's contentions by the court below (Appendix, *infra*, p. 6a), additionally favor the granting of the writ, in the exercise of this Court's last-mentioned function, and in vindication of the rule of *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234; *Westinghouse Electric Corp.* v. *Wray Equipment Corp.*, 286 F. 2d 491, 493 (C.A. 1, 1961), cert. den. — U. S. — (1961). See also Wigmore, On Evidence (3d Ed.), §1415.

3. The unfairness of the conviction was intensified by the admission of evidence which imputed to the petitioner the commission of the prior unrelated crime of usury; additional cause is thereby presented for the Court's exercise of its aforementioned function. The witness Mishel

read extensively from the grand jury transcript, as seen. The defense attorney at one point perceived that the place was about to be reached in the reading where Mishel had given the grand jury the statement of petitioner's alleged admission that Chait put him into the trucking business (D104a). Knowing that this statement also contained an alleged admission of "shylocking" by petitioner, the defense attorney objected (*ibid.*), but without avail (D105a). This error was the worse because the very question of whether Chait put petitioner into the business was not even within the issues, in that the indictment did not charge falsity on that subject (p. 4, *supra*). It is common knowledge that "shylocking" betokens usury, which is a crime under N. Y. Penal Law §2400. The imputation was reversibly prejudicial. *United States* v. *Tomaiollo*, 249 F. 2d 683 (C.A. 2, 1957); *United States* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656 (C.C.A. 2, 1947), cert. den. 331 U. S. 831; *Pyle* v. *United States*, 156 F. 2d 852 (App. D. C. 1946). Further, the same prejudicial testimony was re-read to the jury, over defense objection, after the jury retired to consider its verdict, and under circumstances which we contend rendered unnecessary and improper the reading of *any* testimony on the area of the case to which the prejudicial portion related (D178a-182a, D198a-211a). The court below found no merit in our contentions presented in this paragraph (Appendix, *infra*, p. 12a).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARNOLD BAUMAN
Counsel for Petitioner

August 18, 1961

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 352—October Term, 1960.
(Argued April 13, 1961 Decided May 24, 1961.)
Docket No. 26738

UNITED STATES OF AMERICA,

Appellee,

—v.—

MANNIE GOLDBERG,

Defendant-Appellant.

Before:

CLARK, MEDINA and FRIENDLY,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Archie O. Dawson, *J.*, convicting appellant under three counts of an indictment for perjury after a jury verdict of guilty. Affirmed.

ARNOLD BAUMAN (Bauman, Epstein & Rice; Arnold Bauman and Frederick R. Biehl on brief), New York, New York, *for Defendant-Appellant.*

EDWARD BRODSKY (Morton S. Robson, United States Attorney for the Southern District of New York, Edward Brodsky and Arthur I. Rosett, Assistant United States Attorneys, of Counsel), *for Appellee.*

FRIENDLY, *Circuit Judge*:

The principal issue here is the sufficiency of the Government's evidence under the rule, applicable in prosecutions for perjury, "that one witness, without corroborating circumstances, does not suffice," 7 Wigmore, Evidence (3d ed. 1940), p. 273: *Weiler* v. *United States*, 323 U. S. 606, 608 (1945). Sufficient apart from this, it plainly was.

Goldberg was convicted on Counts I, II and IV of an indictment charging perjury in violation of 18 U. S. C. §1621, Count III having been dismissed by the Court. He was sentenced to three years' imprisonment on each count, the sentences to run concurrently, and was fined $2,000 on each count.

The allegedly perjured testimony was given in May and June 1956 before a Federal grand jury investigating possible violations of the laws relating to racketeering, 18 U. S. C. §§1951 and 371. The investigation appears to have been particularly concerned with the activities of one Abe Chait. Defendant Goldberg and Joseph Stern had formed a partnership to engage in the trucking business, known as Stern's Express Co., in August, 1945. The Government was endeavoring to find out from Goldberg whether Chait was responsible for Goldberg's entering into the partnership

and whether Chait received any money from it; Goldberg denied both. Counts I and IV of the subsequent perjury indictment related to Goldberg's denials before the grand jury that he knew Chait before forming the partnership—Count I relating to a simple denial of such knowledge, and Count IV concerning a more circumstantial statement along the same lines, including an answer that Goldberg had first met Chait after formation of the partnership, when he would see Chait "walking through the street," Chait's own business having been "across the street," and a denial that Chait had anything to do with Goldberg's going into Stern's Express. Count II related to Goldberg's denial to the grand jury that Chait ever received any money from Stern's Express. The defense stipulated the materiality of the grand jury testimony.

The Government's case was presented through three witnesses: Joseph Stern, Irving Mishel, who had lived in the same apartment house as Goldberg and who had a long criminal record, and Earl L. Hassell, Jr., an F.B.I. agent who had analyzed the books and records of Stern's Express Co.

To support Counts I and IV, the Government produced testimony by Stern that Stern had seen Goldberg and Chait together once or twice, "talking nice," before August 1945 when Stern's Express started, and that the partnership was arranged at a meeting between Stern and Goldberg which Chait attended. For corroboration the Government relied on testimony given by Mishel, in a manner hereafter discussed, that Goldberg had told Mishel "that when he come out of the service he figured he was going to go back in the Shylocking business but instead he met Big Dick who

was connected with the Chaits • • • And Chait said 'Listen,, I got a trucking business. I will put you in. We will work out a proposition.' So he went in to Stern's Express."

To establish Count II, the Government relied on three pieces of evidence:

(1) *Testimony by Mishel.* This was that Goldberg had told him Chait was getting money from Stern's Express—"something like" $200 a week, although "It could have been $150; it could have been $250."

(2) *Testimony by Stern.* He first said that, a few months after the formation of the partnership, there was discussion between Stern and Goldberg, at the latter's instance, as to some drawing for Chait in the form of expenses and that Goldberg had said "We got to get together" and "We will get together about what we are going to do about it." Then, having refreshed his recollection by reading his testimony before the grand jury, Stern added that he and Goldberg "agreed to a certain extent" that whenever they "drew money Abe Chait would draw money"; that "sometimes" Chait was going to draw as much as Stern and Goldberg; that "Sometimes business was bad, so we don't draw. Sometimes business was better, we draw more"; that Chait did not draw all the time but did draw "when business was better"; that Chait did not take out the same amount as Stern and Goldberg "all the time"; and that "everything was taken out of expenses." Further direct examination of Stern as a hostile witness on the basis of his grand jury testimony weakened rather than strengthened this, and cross-examination weakened it more. Stern ended up by saying, in answer

to an endeavor by the Court to reconcile his testimony on direct and on cross-examination, "I don't know whether he [Chait] got any money exactly."

(3) *Hassel's analysis of the distribution in the Cash Disbursements Book of Stern's Express Co. of the cash checks allocated to payroll, "expenses" and drawings.* This analysis showed that from August 3, 1945 to September 30, 1947, the drawings had been $200 and that, for each week except two, the unidentified "expenses" were at least $100 but rarely exceeded $135—the "expenses" for the last ten weeks of the period, for example, averaging $114. Commencing with the week ending October 7, 1947 and continuing through May 13, 1951, the drawings increased to $250, an equal division between Goldberg and Stern being shown from August 1, 1950. In that period, the amounts for unidentified "expenses" were never less than $125 and usually were rather more; in the ten weeks beginning October 7, 1947, for example, the average jumped from the $114 of the preceding ten weeks to $142. From May 22, 1951 through October 26, 1953, Goldberg's and Stern's drawings were increased to $150 each; coincidentally, the unidentified expenses, which had averaged $163.70 per week in the ten weeks before the increase, jumped to an average of $183.60 in the ten weeks thereafter—only on three occasions after May 22, 1951, were they less than $170 per week and never did they fall as low as $150.

We deal at this point with appellant's claim that the testimony of Mishel must be disregarded on the ground

that Mishel had no present recollection but merely acknowledged he had given certain testimony before the grand jury. Although we may sympathize with the difficulties of a prosecutor in examining a witness who, if not actively hostile, was exceedingly timorous, we should have to sustain the legal contention if it were factually made out, *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 234 (1940); *Westinghouse Electric Corp.* v. *Wray Equipment Corp.*, 286 F. 2d 491-493 (1 Cir. 1961), cert. denied —— U. S. —— (1961); 5 Wigmore, Evidence (3d ed. 1940), § 1415. It is not. Although appellant's characterization may not be incorrect as to Mishel's direct testimony, Mishel went considerably further before leaving the stand. After sharp interrogation by the defense as to his criminal record, the witness experienced an access of what the jury could have regarded as either hostility or confidence. He thought it "about time that I tell the truth and that is it and I decided to tell the whole truth." When asked "Is it the truth that you recall or don't recall these conversations which you say you had with Mannie Goldberg about Chait, now as you sit here?", he responded "How many times did I say I recall it as being true and I recall it as being absolutely true"; and "Listen. Those things took place • • • These incidents took place 10, 12 years ago, counselor, and with all due respect to you, as you know, I had been under quite a bit of pressure the last few years. So I wanted to refresh." Finally when asked again whether he had any independent recollection, he replied, "I recall conversations between Mannie and myself and many other parties regarding Chait."

Appellant contends that the special evidentiary rule in perjury trials cannot be met by the testimony of one

witness as to facts inconsistent with the truth of the allegedly perjurious utterance and of another witness as to an oral admission by the defendant, which was all the Government presented as to Counts I and IV; and still less by testimony as to an oral admission by the defendant plus circumstantial evidence, which the appellant urges and the Government, we think needlessly, seems to concede to have been the proof with respect to Count II. Disposition of these contentions will be aided if we first examine the rationale of the special perjury rule and the status of admissions by the defendant in perjury cases.

The historical origins of the rule that a conviction for perjury may not be had on the basis merely of "oath against oath," *Rex* v. *Fanshaw*, Skinn. 327 (1693); *Rex* v. *Muscot*, 10 Mod. 192 (1714); *Weiler* v. *United States*, *supra*, at 611, are illuminatingly described in 7 Wigmore, Evidence (3d ed. 1940), pp. 273-275. In our time the rule rests on society's obligation to protect a witness "from oppression, or annoyance, by charges of having borne false testimony," from those "against whom his evidence tells," Best, Evidence (1849), §§605-606, quoted in 7 Wigmore, Evidence, at p. 276. Logically that policy would be satisfied by requiring added proof only when the "oath" relied on by the prosecutor is that of a person in an adversary relation to the defendant. However, the rule clearly goes further; it is most accurately stated in the negative fashion that Wigmore employs, "one witness, without corroborating circumstances, does not suffice," p. 273. It differs from the special rule in treason trials in that two witnesses are not always required; indeed, a conviction may sometimes be had when there are none at all, *United States* v. *Wood*, 14 Pet. 430 (1840); *United States* v. *Collins*, 272 F. 2d 650

(2 Cir. 1959), save as to the identity of physical objects having circumstantial relevancy.

The special status of evidence of an admission in prosecutions for perjury rests upon the nature of the offense. The relevancy of a defendant's prior or subsequent statement of fact contrary to his testimonial assertion is that in the absence of evidence of a change in defendant's knowledge, the jury may permissibly infer that one or the other utterance did not reflect defendant's belief at the time it was made. The difficulty is that, without more, there is no more reason for thinking the admission to have been true and the testimony false than the reverse. This reason underlies the holdings that a perjury conviction may not be had solely on the basis of oral admissions contrary to the allegedly perjurious statement, even if several witnesses testify to the admissions. *Clayton* v. *United States*, 284 Fed. 537 (4 Cir. 1922); *Phair* v. *United States*, 60 F. 2d 963 (3 Cir. 1932).[1]

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[1] In *McWhorter* v. *United States*, 193 F. 2d 982 (5 Cir. 1952), this principle was held to require reversal of a conviction based upon an admission, proved by three witnesses, which not merely contradicted the allegedly perjurious statement but affirmatively stated the latter was false; the state cases on this are divided and we would not wish to be understood as necessarily agreeing with the *McWhorter* decision. The Court there sought to distinguish our affirmance of a conviction in *United States* v. *Buckner*, 118 F. 2d 468 (2 Cir. 1941), where the admission of falsity was made by the defendant on the stand in the perjury trial.

It was said in *Remington* v. *United States*, 191 F. 2d 246, 249 (2 Cir. 1951), in a discussion preliminary to the decision, that "the law is well settled that his [defendant's] declaration, if oral, will not satisfy the rule, although they will if written and adequately corroborated," citing *United States* v. *Wood*, *supra*. The first part of the statement accords generally with the cases cited above, although it is hard to see why in a case where, e.g., two or more witnesses testified that the defendant, repeatedly, and under varying circumstances, had made statements differing from his sworn testimony, a jury could not be convinced beyond rea-

Examining the evidence on Counts I and IV in the light of this analysis, we see no basis for doubting that Stern's testimony that Goldberg had known Chait before the formation of the partnership was adequately corroborated by Mishel's testimony that Goldberg had admitted as much. The policy underlying the rule against a conviction simply by "oath against oath" is met when Stern's oath is supported by testimony of a second witness sufficient to "confirm the single witness' testimony and to induce the belief of it," 7 Wigmore, Evidence, p. 277, even though the testimony of the second witness is to a statement emanating from the defendant himself. And the objection that invalidates a perjury conviction resting solely on the basis of statements by the defendant of facts different from what he said under oath, namely, that, without more, there is no basis for the jury's finding the testimonial utterance rather than the inconsistent one to have been false, is inapplicable when the admission, always relevant but generally not alone

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sonable doubt that the defendant did not believe the latter to be true. One may equally doubt that a single written admission would invariably suffice. True, such an admission differs from the usual extra-judicial oral admission in not being open to the general infirmities of mistake or prevarication by the declarant or to the "grudge" objection which affords the policy basis for the special perjury rule; but there is still the question whether the testimony or the admission was what defendant believed. The written materials in the *Wood* case in the Supreme Court were not "admissions" in the sense of recitals of the facts otherwise than the defendant had sworn; they were invoices and business letters which showed defendant knew the value of the goods to be more than the prices stated in his sworn customs entry. A fair case could be made that the rule with respect to conviction on admissions alone ought be simply that the court must be satisfied that the jury could reasonably be convinced beyond reasonable doubt that the admission represented defendant's true belief, plus, if the admission or admissions be oral, that it or they must be proved by more than a single witness.

sufficient, is used to corroborate testimony by another witness as to objective facts which themselves afford a basis for finding that the admission represented what defendant knew to be the truth. Under these circumstances the usual rule, that admissions "have such testimonial value as belongs to any testimonial assertion under the circumstances," 4 Wigmore, Evidence (3d ed. 1940), pp. 5-6, applies. Hence, as said in *Vetterli* v. *United States*, 198 F. 2d 291, 293 (9 Cir. 1952), vacated and remanded on other grounds, 344 U. S. 872 (1952), "We do not believe an extra-judicial admission made by an accused is insufficient as corroboration simply because it is such."

With respect to Count II, appellant relies on the statement in *Umbriaco* v. *United States*, 258 F. 2d 625, 628 (9 Cir. 1958) that "a corroborated, oral, unsworn admission of falsity" is never sufficient to support a conviction for perjury, no matter how strong the circumstantial corroboration may be. Although we have no difficulty with the result there reached, for reasons pointed out in the concurring opinion of Judge Pope, we think the rule is not so rigid as the majority assert. Any such view seems quite inconsistent with the Supreme Court's decision in *United States* v. *Wood, supra*, that there may be a conviction for perjury without the testimony of any "witness" at all when the circumstantial evidence is sufficiently probative.[2]

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[2] It was there said, at 440, "If we will but recognize the principle upon which circumstances, in the case of one witness, are allowed to have any weight, that principle will carry us out to the conclusion, that circumstances, without any witness, when they exist in documentary or written testimony, may combine to establish the charge of perjury; as they may combine, altogether unaided by oral proof, except the proof of their authenticity, to prove any other fact connected with the declarations of persons, or business of human life."

If the books of Stern's Express had contained a column labelled as payments to Chait, that would have been enough to support a conviction without the testimony of any witness save as to their authenticity. *United States* v. *Wood*, *supra*; *United States* v. *Collins*, *supra*. The same would be true if the books had contained a code reference to Chait and a witness supplied the key to the code. We would suppose, therefore, the Government here could bring itself within *United States* v. *Wood* by combining the book entries of Stern's Express with Mishel's testimony as to an admission by Goldberg which could convince the jury beyond reasonable doubt that the effect of the records was the same as if Chait's name had appeared, or, putting the matter more broadly, that the objection to a perjury conviction solely on the basis of an admission is removed by records, or other circumstantial evidence, affording a basis for the jury's being convinced beyond reasonable doubt that the admission represented defendant's true belief and the testimonial assertion was the falsehood.

However, this case does not require us to go so far. There was more evidence on Count II than Mishel's testimony as to the admission about payments to Chait and the compelling inference from the course of the book entries in the light of that.[3] As previously noted, Stern testified that payments were made to Chait; to be sure, his testimony was halting and was weakened on later examination, but that was for the jury to weigh under all the circumstances, on instructions as to which appellant makes no complaint.

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[3] Appellant's argument that the total expenses of the business were increasing fails to account for the synchronization of the jumps in unidentified "expenses" with increases in the partners' drawings.

Hence Stern provided the testimony of one witness as to the objective facts on Count II, as he had on Counts I and IV, and the books would have been sufficient corroboration alone, *a fortiori* when coupled with defendant's admission to Mishel. See *Arena* v. *United States*, 226 F. 2d 227 (9 Cir. 1955); 7 Wigmore, Evidence (3d ed.), §2042(2).

The chief of appellant's other points is that he was prejudiced when the prosecutor, knowing that Mishel was following a transcript of his own grand jury testimony, asked a question bound to elicit a reading of the answer, quoted above, which included the word "shylocking." Appellant contends this imputed to him the commission of the crime of usury, New York Penal Law, §2400, and that the prejudice was later compounded; after the jury had requested a reading of the testimony as to when appellant had met Chait and had retired without having been read the offending passage, which the reporter had not yet found, they were then recalled to hear it. A short answer to the first complaint is that defense counsel, who also had a copy of the grand jury transcript before him, instead of merely objecting generally to the prosecutor's clearly proper question "Did the defendant ever tell you that Abe Chait put him into Stern's Express?", could have asked that the witness be cautioned or could have immediately moved to strike or requested an appropriate admonition to the jury. Furthermore, we do not think the jury would have taken the alleged reference to "shylocking" as an admission of previous crime. The later reading of this portion of the transcript to the jury was entirely innocent; it clearly fell within the jury's request, as defense trial counsel properly conceded, and the Court warned the jury that the reading

was not to be considered as emphasizing this testimony, which must be taken by them in conjunction with all the rest.

We likewise find no merit in appellant's objections to the Court's failure to hold a hearing to settle the record. The material alleged not to have been taken down by the reporter consisted of colloquy between the jury and the judge when the jury asked that certain of the testimony be read. No point was made of this omission of the reporter until the above-mentioned testimony of Mishel was located. After the trial Judge Dawson reviewed the transcript and stated in a memorandum that, with two exceptions noted by him, it was correct; this procedure was proper under F. R. Crim. Proc. 39(6)(1) and F. R. Civ. Proc. 75(h). Moreover, appellant has not pointed to anything in the colloquy alleged to have been omitted that could affect our decision.

Affirmed.

MEDINA, *Circuit Judge* (concurring):

I concur in the affirmance of the judgment of conviction and agree with the reasoning of my brother Friendly's opinion and the principles stated therein. What troubles me somewhat is the statement: "If the books of Stern's Express had contained a column labelled as payments to Chait, that would have been enough to support a conviction without the testimony of any witness save as to the authenticity." The facts of the two cases cited in support of this statement, *United States* v. *Wood*, 1840, 14 Pet. 430, and *United States* v. *Collins*, 2 Cir., 1959, 272 F. 2d 650, appear to me to be "far stronger, more cogent and more

convincing," 272 F. 2d at page 652, than the direct testimony of one witness together with some corroborating proof, in accordance with the rule commonly applied in perjury cases. Whether or not this would be the case on my brother Friendly's hypothesis might well depend upon a variety of attendant circumstances, and upon what constitutes the proof of authenticity in a particular case. I would prefer to cross that bridge when we come to it.

APPENDIX

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of May, one thousand nine hundred and sixty-one.

Present:

HON. CHARLES E. CLARK,
HON. HAROLD R. MEDINA,
HON. HENRY J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

MANNIE GOLDBERG,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v.—

MANNIE GOLDBERG,

Defendant-Appellant.

Before CLARK, MEDINA, and FRIENDLY, *Circuit Judges.*

On Petition for Rehearing.

ARNOLD BAUMAN and FREDERICK R. BIEHL,
of Bauman, Epstein & Rice,
New York City,
for defendant-appellant.

PER CURIAM.

Petition for rehearing denied.

C. E. C.
H. R. M.
H. J. F.
U.S.C.JJ.

Aug. 10, 1961

APPENDIX

Order of United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of August, one thousand nine hundred and sixty-one.

Present:

HON. CHARLES E. CLARK,
HON. HAROLD R. MEDINA,
HON. HENRY J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

MANNIE GOLDBERG,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX

Statutes Involved

TITLE 18, USC SECTION 1621:

> "Whoever, having taken an oath before a competent tribunal, officer or person, in any case in which the law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, wilfully and contrary to such oath states or submits any material matter which he does not believe to be true, is guilty of perjury; * * * "

NEW YORK PENAL LAW, ARTICLE 214—USURY:

> "§ 2400. Taking security upon certain property for usurious loans
>
> A person who takes security, upon any household furniture, sewing machines, plate or silverware in actual use, tools or implements of trade, wearing apparel or jewelry, for a loan or forbearance of money, or for the use or sale of his personal credit, conditioned upon the payment of a greater rate than six per centum per annum or, who as security for such loan, use or sale of personal credit as aforesaid, makes a pretended purchase of such property from any person, upon the like condition, and permits the pledger to retain the possession thereof is guilty of a misdemeanor."